Escada (USA), Inc. *and* Local 138, International Ladies' Garment Workers' Union. Case 22–CA–16582

August 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On February 22, 1991, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] to modify the remedy,[3] and to adopt the recommended Order.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Escada (USA), Inc., Moonachie, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] Interest on backpay will be computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[4] The judge's recommended remedy requires the Respondent to provide reinstatement and backpay to discharged employee Neal Bisno. The Respondent contends that neither is appropriate because it would not have hired Bisno had it known that he falsified his job application by stating that he was unemployed though he actually worked for the Union. At most, the Respondent submits, Bisno may be entitled to backpay from the date of his discharge to the date it learned of the falsification. We leave to the compliance stage of this proceeding the question of what effect, if any, the falsification should have on the remedy. The Respondent will then have an opportunity to establish when it acquired knowledge of Bisno's asserted misconduct and to show whether this would have provided grounds for termination based on preexisting, nondiscriminatory company policy. See, e.g., *John Cuneo, Inc.*, 298 NLRB 856 at fn. 7 (1990).

Our dissenting colleague maintains, in accordance with the Fourth Circuit's decision in *H. B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989), that Bisno, a paid union organizer intern, was not an employee within the meaning of the Act. We disagree. As the Board held in *Oak Apparel*, 218 NLRB 701 (1975), and reaffirmed in *H. B. Zachry Co.*, 289 NLRB 838 (1988), and in *Willmar Electric Service*, 303 NLRB 145 (1991), paid union organizers are entitled to the same protected Sec. 2(3) ''employee'' status as other applicants. Although paid union organizers who obtain employment with a company may be temporary employees excluded from any bargaining unit, they are entitled to the full protection of the Act. *299 Lincoln Street, Inc.*, 292 NLRB 172, 180 (1988). Accordingly, it is unlawful for an employer, on the basis of antiunion discrimination, to refuse to hire an applicant or to discharge an employee, even if the applicant or employee is a paid union organizer. That is precisely what the Respondent has done.

MEMBER OVIATT, dissenting in part.

Because I find that Neal Bisno was not an employee within the meaning of the Act, I would reverse the judge's finding that the Respondent violated Section 8(a)(3) of the Act by discharging him. For the same reason, I conclude that the strike in protest of his discharge was not an unfair labor practice strike and that the Respondent did not violate Section 8(a)(1) of the Act by threatening the strikers with permanent replacement. I would affirm the remainder of the judge's findings, conclusions, and remedy.[1]

The Union sent Bisno, a paid union organizer intern for whose salary and benefits the A. Philip Randolph Foundation reimbursed the Union, to apply for a job with the Respondent, which hired him. Obviously, Bisno's purpose was to organize the Respondent's warehouse employees and he indeed, by all accounts, spent a considerable part of his time doing just that. The Respondent discharged Bisno about a month after he began working for it, stating that he spent too much time walking around and talking to other employees instead of doing his job, and that he had harassed some employees. The judge found that the Respondent's discharge of Bisno violated Section 8(a)(3) of the Act. I agree with the Respondent's contention that in this context Bisno was not an employee of the Respondent within the meaning of the Act.

In *H. B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989), the court denied enforcement of a Board order requiring an employer to offer a job to an applicant (Edwards) it had refused to hire because he was a professional union organizer. In doing so, the court stated that if hired the applicant would ''share some of the external characteristics of a Zachry employee'' but

> at core he would remain an employee of the union. An employee is a person who while on the job works under the direction of a single employer. [Id. at 73.]

The court explained that if Zachry paid Edwards that would not alter the situation:

> If Edwards simultaneously performs services for Zachry at his union employer's behest, he nonetheless remains in the union's employ, even though he receives some remuneration from Zachry. He cannot be considered an employee of Zachry since he is performing services for Zachry only because instructed to do so by his union employer. This is not to say that an employee owes his employer some type of transcendent loyalty; rather, it is only to emphasize that the plain meaning of the term ''employee'' contemplates an employee working under the direction of a single

[1] Because I conclude that Bisno's discharge did not violate the Act, I find it unnecessary to decide whether the judge's remedy, insofar as it concerns Bisno, should be modified.

> employer. The term plainly does not contemplate someone working for two different employers at the same time and for the same working hours. [Id.]

The court noted that, in the case of an organizer-applicant, it was not merely the temporary nature of his interest in employment that set him apart ''from a bona fide applicant, but the entire character of the future employment relationship.'' Id. at 74. The court also grounded its decision on ''policy concerns underlying the Act.'' Id. Thus, to protect employees' free choice, the Act limits the context in which ''adversariness'' between employers and unions may operate:

> For example, a union does not have an absolute right to enter an employers' premises even for section 7 activities protected under section 8(a)(1) of the Act. In *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 110, 76 S.Ct. 679, 683, 100 L.Ed. 975 (1956), the Court held that an employer is within its rights to post its property against nonemployee distribution of union literature. ''The Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available.'' *Babcock*, 351 U.S. at 113–14, 76 S.Ct. at 684–84. [*H. B. Zachry Co. v. NLRB*, supra at 74.]

The court further pointed out that the protection offered employers by *Babcock* would be made ineffective if Zachry were required to let ''Edwards solicit and organize on its property because he was claiming entrance as a 'job applicant.''' Id.

Insofar as I can determine from the record before me, the situation of Bisno in the instant case was, in all material respects, similar to that of Edwards in Zachry. I concur in the Fourth Circuit's analysis in Zachry, and I therefore find that Bisno was not an employee within the meaning of the Act in this context. Bisno thus was not entitled to the protections of the Act here and his discharge therefore did not violate the Act. I would overrule Oak *Apparel*, 218 NLRB 701 (1975), and its progeny.[2]

Marguerite R. Greenfield, Esq. and *Dorothy C. Karlebach, Esq.*, for the General Counsel.

John P. Furfaro, Esq. and *Maury B. Josephson, Esq. (Skadden, Arps, Slate, Meagher & Flom)*, of New York City, for the Respondent.

Lester Kushner, Esq., of New York City, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint alleges that Escada, Inc. (Respondent) has engaged in unfair labor practices as defined in Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent is alleged to have discharged one employee and to have threatened, promised benefits to, and in other ways coerced employees in order to discourage them from joining or supporting Local 138, International Ladies' Garment Workers' Union (the Union). Respondent's answer denies those allegations.

I heard this case in Newark, New Jersey, on May 24, 30, and 31 and June 4, 1990. On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is engaged in the warehousing, distribution, and nonretail sale of women's apparel. In its operations annually, it meets the Board's nonretail jurisdictional standard.

The Union is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent has approximately 33 employees at its warehouse in Moonachie, New Jersey. They are unrepresented for purposes of collective bargaining. The warehouse is 40,000 square feet in area and has three rooms. The largest is used to ticket and pack women's apparel. Of the other two rooms, one is used by Respondent's wholly owned subsidiary, First Choice, Inc., to sell, at retail, clothes transferred from the large room at the end of each apparel season. The third room is used to store overflow items.

Respondent's director of distribution, George Bonafacio, is in charge of the Moonachie warehouse. He has four managers who report to him.

B. *The Discharge of Neil Bisno*

The General Counsel alleges that Respondent discharged warehouse employee Neil Bisno because of his union activities. Respondent asserts that Bisno was an organizer in the employ of the Union and that he is not entitled to the Act's protection. Respondent also contends that it discharged Bisno because he kept wandering away from his assigned work areas when he should have been working and because he harassed employees.

Bisno graduated from Princeton University in June 1989. (All dates hereafter are for 1989 unless stated differently.) In September, Bisno was employed as an organizer intern by the Union. The Union gave him a salary and benefits and

[2] Since the Respondent's discharge of Bisno was not an unfair labor practice, the strike in protest of the discharge cannot be deemed an unfair labor practice strike. It further follows that the Respondent did not make an unlawful threat by insisting that the strikers return to work or risk being permanently replaced.

was reimbursed by a grant from the A. Philip Randolph Foundation.

Bisno was sent by the Union to apply for a job at the Moonachie warehouse. On his job application there, he wrote that he was unemployed. He was hired and began work for Respondent on September 18. Bonafacio assigned him, on that day and on the following days for several weeks, to packing work.

During the first 2 weeks of Bisno's employ, Bonafacio promoted a warehouse employee, Clifton Burton, to a supervisory position and announced that promotion to employees. Burton supervised Bisno and 11 other employees on a sample sale project in the period October 10 to 17. It was about this same time that Bisno began to talk with his coworkers about the Union.

On October 10, Bisno and two warehouse employees, Noel Mijares and Nicano Reyes, met with union officials at a diner. They signed union authorization cards and were given cards to be distributed to their coworkers.

Mijares later spoke to several employees about the Union. He testified that he also asked Clifton Burton what he thought about the Union and that Burton replied that he was not interested, that the Union wanted only to collect dues, that he could not join the Union because he was ''with management,'' and that he knew that Mijares had a meeting with Bisno. Mijares was asked at the hearing why he approached Burton about the Union as Burton was then a manager. He answered that he learned of Burton's promotion after he had spoken with Burton about the Union and that he would not have done so if he had known that Burton was then a manager.

Burton, when asked by Respondent's counsel at the hearing whether he knew that Bisno was organizing for the Union and whether he discussed the Union with Mijares, answered in the negative.

Respondent contends that Mijares' testimony is not credible because he denied knowing of Burton's supervisory status despite the fact that Bonafacio had announced Burton's promotion weeks previously. Nonetheless, Mijares' account impressed me as candid and I have strong reservations as to Burton's denials, particularly his testimony on another issue, discussed below, was rather unpersuasive. I credit Mijares' account.

During this time frame, early to mid-October, Bisno talked about the Union with most of the warehouse employees. He endeavored to be discreet. On one occasion, for example, an employee sought to give him a signed union card while they were in an open area, but he instead waited until they were behind a rack of clothing before he received the card.

Of the 33 warehouse employees, Bisno received, in a little over a 2-week period, union authorization cards signed by 17. He arranged for two union meetings which were held away from the Moonachie facility—the one on October 10 discussed above and a second, on October 17. He tried unsuccessfully to persuade at least some of the other warehouse employees to join the Union. Thus, he twice asked Vimu Patel if she was interested in joining the Union, but she declined. Bisno testified that she seemed to be very scared. Bisno testified also that he spoke with Dennis Frank about the Union and that Frank told him that he was doing fine and was not interested.

On October 18, Bisno was assigned by Bonafacio to work with another employee, Mario Oramas, on an inventory project. That day, according to Bisno, he spoke with a coworker, Dennis Verge, about joining the Union and when Verge said he would think about it, Bisno asked him not to mention their conversation to his friend, Dennis Frank. In making this request, Bisno told Verge, using a crude metaphor to do so, that Frank was too close to Bonafacio to be trusted. Verge, however, did tell Frank. Frank, later that day, angrily confronted Bisno for talking about him behind his back. Frank also told Bonafacio of his confrontation with Bisno. Both Frank and Bonafacio testified that they did not discuss Bisno's union activities.

Vimu Patel, who as noted above had been asked twice by Bisno to support the Union testified that shortly before she left for vacation on October 20,[1] she told Bonafacio that Bisno, ''told [her] to sign something. But [she] don't want to sign'' and that was the extent of the conversation they had.

Bisno testified that, when he reported for work on October 19, Bonafacio told him he was discharged for walking around and for talking with employees instead of doing his job, and that he was harassing employees. When Bisno asked what that meant, Bonafacio declined to discuss the matter further.

Bisno denied that he had harassed any of his coworkers. He testified that there was no rule prohibiting employees from talking to one another while working and that employees did talk among themselves while at work. Bisno also testified that the only time anyone expressed any criticism of his work was during his first week at the warehouse when he mismarked a box and Bonafacio then told him to be careful.

Respondent presented the following testimony in support of its contention that Bisno was lawfully discharged.

Bonafacio testified that he spends half of his working time in the warehouse area with the employees there, that he had received numerous complaints from his four supervisors about Bisno's wandering away for prolonged periods from, his work assignments and talking with employees who were trying to do their jobs, that he himself observed Bisno doing this on a number of occasions, and that Bisno gave him unbelievable excuses for having left his assigned work areas. Bonafacio also testified that his supervisors also reported to him that Bisno gave them similar excuses for his wanderings. His testimony indicated that Bisno thereby placed an undue burden on him as he was then facing the very difficult task of coordinating, in a timely manner, three projects getting ready for the sample sale, taking inventory, and receiving new seasonal apparel in time for shipment by November 1.

Bonafacio testified further as to the complaints he received about Bisno. He related that, on October 13, he began to receive complaints about Bisno's wandering, first from supervisor Clifton Burton, and that he received four similar complaints on October 17 and an additional 16 complaints on October 18. In addition to Burton, he identified Vimu Patel, Dennis Frank, Mario Oramas, and Ana Sanchez as employ-

[1] Initially, she testified that she spoke with ''Bonafacio'' on the evening of October 17. When pressed as to why she recalled that date, she then testified that she did not recall exactly whether it took place 1, 2, or 3 days before she left for vacation.

ees who complained to him. He testified he was unable to recall the names of the other employees who complained.

Respecting Bonafacio's testimony as to complaints he received from Clifton Burton, Burton testified that, when Bisno was assigned to work under him on the sample sale project, Bisno instead wandered around the warehouse, distracting other employees, and gave excuses to Burton which Burton did not believe. Burton further testified that he mentioned Bisno's wanderings to Bonafacio. However, an affidavit he signed prior to the hearing stated that he did not tell Bonafacio of Bisno's wanderings ''as things like this [he, Burton] can deal with.'' Burton testified at the hearing that statement in his affidavit is not true, although he gave the affidavit in the presence of Respondent's attorney. Burton asserted that he had been misquoted and that he did not correct the error when he signed the affidavit because he had read the affidavit hurriedly.

Respecting Bonafacio's testimony that Vimu Patel complained to him as to Bisno, Bonafacio related that she had come to his office on October 17 and told him (1) that Bisno had ''asked her a couple of different questions, (2) that she felt uncomfortable in his presence,'' (3) that ''she asked him to leave her alone [as] she was not interested,'' and (4) that ''he continued to pester her with the same questions again.'' Bonafacio testified that Patel got upset and began crying in his office. He testified also that Patel told him then that Bisno ''wanted her to sign some sort of papers.'' Bonafacio also testified that he did not ask her what papers Bisno asked her to sign and that the word, Union, was not mentioned in their conversation. He related that he told Patel that he would talk to Bisno the following day about her complaint. Bonafacio did not talk to Bisno about any such complaint. As noted above, he assigned Bisno on October 18 to the inventory job with Oramas.

Patel's account of her discussion with Bonafacio has been set out previously. She also testified that Bisno had not said anything to her to make her afraid.

Respecting Bonafacio's testimony concerning a complaint received from Dennis Frank, that testimony and Frank's account have been set out above. As to complaints he received from Mario Oramas, Bonafacio and Oramas testified that they relate to events on October 18, discussed next.

Bonafacio's account as to October 18 follows. He assigned Bisno and Oramas to an inventory project. Bisno wandered from that project for 4 hours of the 8-hour workday, according to Bonafacio's own observations and according to reports Bonafacio received from supervisors and from Oramas. The inventory project had been assigned to a team of two employees because one of them had to climb a ladder and call down to the other various aisle numbers on the boxes so that the employee at the base of the ladder could write those numbers on inventory sheets. Safety is also a factor in assigning two employees to work together on the inventory project.

Oramas testified he had to work alone for extended periods on October 18, because Bisno wandered away and that, as a result, the project was not completed that day.

Bisno testified that he and Oramas completed the inventory project on October 18, that they took turns on the ladder and on the ground recording entries. Bisno identified, on the worksheets, the entries he made during the periods he was at the base of the ladder. The total of the entries he made was not inconsequential.

Bisno was discharged on October 19. Bonafacio's account of the events on that day follows. Frank complained to him for the second time that morning. (The first time Frank complained occurred a couple of days previously. Frank had said then that Bisno was pestering him with questions about how much he was paid and about personal data.) Fran said on the morning of October 19 that he had heard from a friend that Bisno had made a derogatory comment behind his back which got him very upset. Bonafacio told Frank that it was not worth getting into a fight. Frank did not tell him that Bisno was attempting to organize for the Union. Bonafacio then reflected on the various complaints he had received and decided, to be fair, to consult with Ana Sanchez, a lead person, and with Supervisor Barbara Jo Anderson and, after considering Bisno's short tenure, decided to discharge him.

Neither Sanchez nor Anderson testified.

Bonafacio's account as to what he told Bisno when discharging him does not vary materially from Bisno's account, given above.

Analysis: The first question to be considered in whether there is merit to Respondent's contention that Bisno, as an employee of the Union, is not an employee entitled to the protection of the Act. The Board has rejected such a restricted reading of the definition of an employee as set out in Section 2(3) of the Act. *Oak Apparel Inc*., 218 NLRB 701 (1975). See also *H. B. Zachry Co*., 289 NLRB 838 (1988), and cases cited therein, where the Board adopted Judge Schlesinger's analysis. Respondent urges that apply the rationale on which the U.S. Court of Appeals for the Fourth Circuit used in refusing to enforce the Board's order in *Zachry*, as reported at 889 F.2d 70 (1989). I am not sure that the holding there by the court requires the finding urged by Respondent. In any event, I am bound to follow the precedent set by the Board in *Oak Apparel*, supra. I thus find that Bisno is an employee protected by the Act.

The evidence discloses that Bisno, in a relatively short interval, played a key role in enabling the Union to obtain signed authorization cards from a majority of the 33 warehouse employees, that his supervisor (Burton) had stated to a coworker (Mijares) while they were talking about the Union that he was aware that Bisno and Mijares had been meeting, that Bisno was discharged the day after a union meeting which was attended by a number of warehouse employees, that Bonafacio told Bisno that one of the reasons he as discharged was that he was harassing employees, and that the basis of that statement clearly appeals to be that Bisno had solicited support for the Union among the warehouse employees. In these circumstances, it is evident that the General Counsel has demonstrated that Respondent's decision to terminate Bisno was motivated by his union activities, and I thus find that the General Counsel made out a prima facie case. See *Beth Israel Medical Center*, 292 NLRB 497 (1989).

The burden then has shifted to Respondent to show that, absent Bisno's union activities, Respondent would have discharged him. *Wright Line*, 251 NLRB 1083 (1980). On that point, Bonafacio professed to have been principally concerned with Bisno's leaving his assigned work areas when he should have been working. Respondent asserted that as a

basis for Bisno's discharge. The evidence in the record thereon is unpersuasive.

It strikes me as improbable, if Bisno repeatedly wandered from his work area, that Bonafacio could have still assigned him to two critical projects. As noted, Bonafacio testified that he faced the very difficult task of completing those projects in a timely manner—the sample sale, the inventory check, and receiving the new seasonal apparel. Bisno was assigned to the first two of these projects; the third project had not begun at the time of Bisno's discharge.

I find it difficult to accept Bonafacio's account that he made these assignments to Bisno if Bisno gave him and his managers ''unbelievable excuses'' for not being in his assigned work areas for appreciable periods of time. I note too that Burton's prehearing affidavit conflicted with his testimony at the hearing as to whether he even told Bonafacio that Bisno wandered away from his work. Further, it is unlikely that Bisno would have absented himself from this inventory project on October 18 for half the work time and that Oramas scrambled up and down the ladder by himself for 4 hours. It is even more unlikely from a safety standpoint that Oramas worked alone for 4 hours. Bonafacio testified that two employees are assigned to that job because there is a safety factor involved; it is also improbable that Bisno would have been gone for such protracted periods that day without any warning given him. I further note that there is evidence that one of Respondent's witnesses, Dennis Frank, routinely has left his work area during working time and without incident. All in all, Respondent has not met its *Wright Line* burden, I thus find that its decision to discharge Bisno was motivated by Bisno's union activities and that Respondent has not shown that, absent those activities, it still would have discharged Bisno.

I also find that Burton's statement to Mijares, set out above, had the effect of creating the impression that Respondent kept under surveillance the union activities of its employees. See *Ideal Elevator Corp*., 295 NLRB 347 (1989).

C. *Alleged Unlawful Interrogation*

While Bisno was under Burton's supervision, Burton asked him if he would work overtime when it is available. Bisno replied that ''it sounds all right.'' Burton then remarked, ''Good, I thought you might be a deserter.''

The General Counsel asserts that Burton was playing a game of cat and mouse in that Burton already new of Bisno's activities in support of the Union. Yet, the General Counsel contends that Burton unlawfully interrogated Bisno by using the term, ''deserter.'' There is no allegation that Burton thereby created the impression of unlawful surveillance. In any event, the interpretation urged by the General Counsel is too strained. At most, Burton's comment is ambiguous and not unlawful Cf. *Benham Corp*., 284 NLRB 481 (1987).

D. *Alleged Unlawful Solicitation of Withdrawal of Union Cards*

On or about November 1, Bonafacio distributed to the warehouse employees the following notice:

> We have heard that some of you who signed Union authorization cards would like to withdraw those cards, but don't now how to go about it. If you want to withdraw, you may send a letter addressed to both then and the National Labor Relations Board, telling them you wish to withdraw your card. You have that right.
>
> A sample letter that you may send to both the Union and the Labor Board is attached.
>
> You have the legal right to sign a card, but you also have the same legal right to withdraw it. Remember, whether or not you choose to get an authorization card returned is SOLELY YOUR DECISION. You may want to retain copies of the letters that you send for your records.

Bonafacio testified that he could not recall the names of the employees who had said they wanted to withdraw their authorization cards.

The sample letter attached read:

> Local 138, ILGWU
> 4810 Kennedy Boulevard
> Union, New Jersey 00887
>
> National Labor Relations Board
> Region 22
> 970 Broad Street
> Newark, New Jersey 07102
>
> Dear Sir or Madam:
>
> I withdraw and revoke my previously signed card for Local 138, ilgwu to represent me at the escada warehouse. I no longer want any union to represent me.

A warehouse employee, Ed Sobczyk, testified that when Bonafacio distributed the above material, Bonafacio said that ''it would be in [the employees'] best interests to do it.'' Bonafacio testified that he told the employees that it was in their best interest to ''look into more facts about the union versus nonunion and so forth.'' I credit Sobczy's account.

In *Adair Standish Corp*., 290 NLRB 317 (1988), the Board reviewed Administrative Law Judge Ries' analysis of earlier Board cases in this area and it observed, citing *Peoples Gas System*, 275 NLRB 505, 507–508 (1985), that ''it is, of course, lawful for an employer to inform employees of their rights under Section 7 [in] an atmosphere free of coercion, intimidation, or union animus.'' In *Adair* the Board found that the notice posted by the employer there advising employees how to revoke their authorization cards was unlawful as that employer had engaged in contemporaneous unfair labor practices analogous to conduct engaged in by the Respondent in the instant case. On that basis, I find that Respondent's advice to employees as to how to rescind their authorizations to the Union coerced them in the exercise of their rights under Section 7 of the Act.

E. *Alleged Unlawful Promises on October 23 and 26*[2]

Two union representatives came to Respondent's parking lot with Bisno on the afternoon of October 19. Bonafacio called Respondent's head office in New York City which sent him a letter signed by Respondent's president, for distribution to the warehouse employees. He gave copies of it to them on October 20. The letter stated that the warehouse

[2] The General Counsel's brief states that par. 12 of the complaint is withdrawn. Respondent had moved at the hearing to have par. 12 dismissed. That allegation thus is no longer before me.

employees were receiving ''competitive wages and excellent benefits.'' Respondent has no employer handbook and it appears that none of the Moonachie employees was aware of the wage structure or of the benefits available to them. Bonafacio arranged with his New York office to have Respondent's director of human resources, Lisa Fuhrman, come to Moonachie on October 23. He informed the employees on October 20 that she would be present on October 23 to answer any questions they had.

1. Fuhrman's meeting

Fuhrman herself had been hired by Respondent only several weeks previously and spent the weekend, prior to October 23, reviewing material to familiarize herself with the wages and benefits policies covering the Moonachie warehouse employees. She testified that she planned on visiting Moonachie at some point but had received instructions to move up her visit to October 23.

Several of Fuhrman's predecessors had visited the Moonachie warehouse in the year preceding her October 23 visit but it appears that, if they tried to inform the employees there of their wage and benefits package, they were not very successful.

At the meeting on October 23, Fuhrman spoke of the benefits available to the warehouse employees and then asked if there were any questions. Various subjects were then brought up by the employees. One employee questioned why Supervisor Barbara Jo Anderson always assigned the same individuals to disagreeable ''garbage'' duty. Another asked about overtime work assignments. Another employee questioned the high cost to employees of their health insurance. A fourth employee complained about the extreme temperatures in the warehouse during the summer and the winter months.

As to the inquiry about the cost of health insurance, Fuhrman advised the employees that Respondent has been looking into other plans. On the other questions, she answered that she would have to look into those matters, according to the accounts of the General Counsel's witnesses, which accounts I credit.[3]

2. Bonafacio's notice to employees

On October 26, Bonafacio distributed to the employees an eight-page handwritten document which informed them that first year employees would be evaluated for raises at 3 months after they started and at 6 months. Bonafacio noted in that document that many of the employees had not been given raises at those intervals and that Respondent planned to ''rectify'' that oversight so as to be in compliance with existing policy.''

3. Analysis

Fuhrman's statements to the employees that she would look into their complaints obviously suggested that she would do so with a view to providing them with satisfactory responses. As these statements were made in the context of Respondent's effort to offset the Union's organizational effort, her statements constituted implied promises to redress the grievances Respondent solicited from the warehouse employees and that she made those remarks to induce the employees not to support the Union. See *Coradian Corp*., 287 NLRB 1207, 1211 (1988). See also *Windsor Industries*, 265 NLRB 1009, 1016–1017 (1982).

Bonafacio's October 26 distribution to employees contained a promise to implement a policy, that was at least dormant, of granting increases to new employees at specific intervals and, in context, was aimed at discouraging these employees from supporting the Union.

F. *The November 8 Telegrams*

On October 23, about 20 warehouse employees attended a union meeting and voted unanimously, to authorize the Union to can a strike in protest of Bisno's discharge. That strike began on November 8. Pickets carried placards stating that they were ''[O]n Strike. Unfair Labor Practice.'' Respondent sent the strikers telegrams advising them that if they did not return to work on November 9, they may be permanently replaced and that they should not put their jobs at risk.

As Bisno was unlawfully discharged and the strike was in whole or in part, in protest of his discharge, the strike was caused by Respondent's unfair labor practice and the strikers may not be permanently replaced. The threat to permanently replace them impinged on their right to participate in such a strike. See *Federated Answering Service*, 288 NLRB 341, 367 (1988).

G. *Alleged Unlawful Promises on November 8 and 9*

Only about eight employees took part in the strike on November 8. One of them, Noel Mijares, testified credibly that he received a telephone can that night from one of Respondent's supervisors, Billy Belmonte, who asked him why he joined the strike. He replied that he did so because he wanted the Union, ''because of an the pressures Barbara, Jo Anderson, a supervisor puts on the employees). . . and an the discriminations. . . .'' Mijares made it clear to Belmonte that the striking employees wanted her discharged. Belmonte then said he would speak to Bonafacio ''first thing in the morning that we are going to do something about Barbara.'' On cross-examination, Mijares stated that Belmonte had simply responded that ''he's going to talk to [Bonafacio].''

Mijares testified that he then called the others who were on strike and that they agreed to meet with Bonafacio the next morning.

On the following morning, the striking employees met with Bonafacio. Mijares told Bonafacio that they wanted him to fire Barbara Jo Anderson. He responded in substance that he did not have the authority to do that and said that the problem can be worked out.[4] Shortly afterwards, Respond-

[3] Bonafacio was not present throughout the meeting. He testified that Fuhrman did not tell them that she would look into any of the matters raised. Fuhrman testified that questions were asked of her about garbage and other matters and that she could not answer them. She did not testify as to how, or if, she did respond to the questions posed by the employees. The accounts given by General Counsel's witnesses are more plausible.

[4] Two of the striking employees testified that Bonafacio stated that Anderson would be fired if she did not change her ways. Mijares did not so testify. Likely, those two strikers were inclined to accept any conciliatory comment as a concession to their strong wish. Likely too, as it appears the employees use English as a second language, some lack of clarity may be traceable to that. In any event, that evidence as a whole does not show that Respondent agreed to discharge Anderson.

ent's associate vice president, L. Jaimee Orans, arrived from her office in New York City. Bonafacio reports to her.

Orans was asked by the strikers to fire Anderson. According to one of the strikers, Ben Francisco, she answered by saying that Anderson would be able to change her way of supervising the warehouse employees if they, in turn, would change their negative attitude toward her.

The evidence is equivocal, at best, that Respondent promised the striking employees on November 8 and 9 that it would remove Anderson as their supervisor. I thus find that the General Counsel has not established by a preponderance of the evidence the allegations of the complaint thereon.

H. *As to Supervisor Anderson*

The General Counsel presented evidence that Anderson was reassigned on or about January 1, 1990, to an office position and relieved then of her supervisory duties toward the warehouse employees. The Union, on December 5, had filed a petition in Case 22–RC–10253 for an election among the warehouse employees at Moonachie. The General Counsel's contention is that Respondent, to discourage support for the Union, granted the employees better working conditions by having removed one they perceived as an unfair supervisor. Respondent asserted that Anderson had not supervised those employees since August and thus denies that she was reassigned in January 1990 so as to influence the warehouse employees as to their feelings toward the Union.

Respondent asserted that Anderson had been transferred in August to office work, away from her supervising functions vis-a-vis the warehouse employees. Thus, Respondent argues that Anderson's transfer antedated any union activity.

I find no merit in Respondent's contention. As noted earlier, Anderson did not testify. Bisno testified uncontrovertedly that he was interviewed for employment by Anderson in September and told by her to report for work. She substituted for Bonafacio in September when he went on vacation. Bonafacio testified that he consulted with her before deciding to discharge Bisno. On October 20, employees complained to the director of human resources, Fuhrman, that Anderson was unfairly assigning them to disagreeable garbage duty, and, as found in the section immediately above, the striking employees still were complaining in November of Anderson's supervisory methods.

I find that Anderson was relieved of her supervisory functions respecting the warehouse employees, not in August, but rather in January 1990 and that Respondent took this action to induce its employees to reject the Union as their collective-bargaining representative. In *Rosewood Mfg. Co.*, 269 NLRB 782, 783 (1984), the Board found that the employer there unlawfully coerced employees in the exercise of their Section 7 rights by suggesting that it would get rid of its plant manager if the employees would drop the union in that case. On the same basis, I find that Respondent's transferring Anderson in January 1990 away from the warehouse employees to encourage them to reject the Union interfered with their right to choose freely whether they desired representation by the Union.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization as defined in Section 2(5) of the Act.

3. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by having:

(a) Created the impression among its employees that their activities in support of the Union were being kept under surveillance.

(b) Solicited its employees to revoke authorizations to the Union to be their collective-bargaining representative.

(c) Solicited grievances from employees and thereby having impliedly promised to remedy those grievances in order to discourage support for the Union.

(d) Informed employees, to discourage support for the Union, that they may receive wage increases on a regularly scheduled basis.

(e) Threatened to permanently replace employees who engaged in a strike to protest Respondent's unfair labor practices.

(f) Reassigned a supervisor away from her responsibilities over the warehouse employees in order to induce them to abandon their support for the Union.

(g) Taken the action described in the next paragraph.

4. Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(3) of the Act by having discharged its employee, Neil Bisno, in order to discourage its employees from joining or supporting the Union.

5. Respondent did not commit any unfair labor practice alleged in the complaint which was not found above.

6. The unfair labor practices found above in paragraphs 3 and 4 affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action necessary to effectuate the purposes of the Act.

Having found that the Respondent unlawfully discharged Neil Bisno, I shall recommend that the Respondent be ordered to offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges previously enjoyed.[5] I shall further recommend that the Respondent be ordered to make him whole for any loss of earnings he may have suffered as a result of the discrimination against him by payment to him of the amount he would normally have earned from the date of his termination until the date of the Respondent's offer of reinstatement, less net interim earnings, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), to which shall

[5] Respondent, in its brief, asserts that as Bisno had lied on his job application form and as the form itself states that any falsification is grounds for dismissal, Bisno forfeited an reinstatement right under the Board's holding in *John Cuneo, Inc.*, 298 NLRB 856 (1990). The problem I have with Respondent's contention, aside from the fact that it was not litigated before me, is that it is premised on a assumption that Respondent would not have hired Bisno if he had informed it, when he applied, that he was with the Union. Cf. *W. Kelley Gregory Inc.*, 207 NLRB 654 (1973). There, the Board denied a discriminatee reinstatement as he had denied he had a bad driving record when he in fact did and as the Board presumed that the respondent there would not have hired him as a truckdriver if it had known of his record. In *Gregory* the Board applied a nondiscriminatory standard. Respondent would have me presume that it would not have hired Bisno because of the Union and deny Bisno reinstatement based on that presumption. I do not think that is appropriate.

be added interest, to be computed in the manner prescribed in *Florida Steel Corp*., 231 NLRB 651 (1977).

I shall also recommend that the Respondent be ordered to remove from its files any reference to the discharge of Bisno.

Finally, I shall recommend that the Respondent be ordered to post the usual notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Escada (USA), Inc., Moonachie, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression among its employees that their activities in support of the Union were being kept under surveillance.

(b) Soliciting its employees to revoke authorizations to the Union to be their collective-bargaining representative.

(c) Soliciting grievances from employees and thereby having impliedly promised to remedy those grievances in order to discourage support for the Union.

(d) Informing employees, to discourage support for the Union, that the may receive wage increases on a regularly scheduled basis.

(e) Threatening to permanently replace employees who engaged in a strike to protest Respondent's unfair labor practices.

(f) Reassigning a supervisor away from her responsibilities over the warehouse employees in order to induce them to abandon their support for the Union.

(g) Discharging an employee in order to discourage membership in or support for the Union.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Neil Bisno immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered as a result of the Respondent's discrimination against him in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the discharge of Neil Bisno, and notify him in writing that this has been done and that the evidence of this discharge will not be used as a basis for future personnel actions against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Moonachie, New Jersey warehouse copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

3. Allegations of the complaint, to which merit has not been found are dismissed.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge any employee in order to discourage membership in, or support for, Local 138, International Ladies' Garment Workers' Union.

WE WILL NOT create the impression among our employees that their activities in support of the Union are being kept under surveillance.

WE WILL NOT solicit employees to revoke authorizations to the Union to be their collective-bargaining representative.

WE WILL NOT solicit grievances from employees so as to impliedly promise to remedy those grievances in order to discourage support for the Union.

WE WILL NOT inform employees, to discourage support for the Union, that they may receive wage increases on a regularly scheduled basis.

WE WILL NOT threaten to permanently replace employees who engage in a strike to protest unfair labor practices.

WE WILL NOT reassign a supervisor away from her responsibilities over the warehouse employees in order to induce them to abandon their support for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Neil Bisno immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits resulting from his suspension and discharge, less an net interim earnings, plus interest.

WE WILL notify Neil Bisno in writing that we have removed from our files any reference to his suspension or discharge, and that the suspension and discharge will not be used against him in any way.

ESCADA (USA), INC.